UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BARBARA BILLINGS,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 98-171-B***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal requires the court to decide whether the commissioner properly determined that the plaintiff — who suffers from arthritis — was not disabled as of June 30, 1991 when she last was insured under the SSD program. I recommend that the decision of the commissioner be vacated and the case remanded for proceedings consistent herewith.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs*., 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found that the plaintiff had not engaged in substantial gainful activity since July 15, 1986, the alleged date of onset of her disability, Finding 1, Record p. 16; that the plaintiff met the disability

[1] This action is properly brought under 42 U.S.C. § 405(g). The Commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on May 7, 1999 pursuant to Local Rule 16.3(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

insured status requirements of the Social Security Act on the alleged date of onset of her disability and continued to meet those requirements only through June 30, 1991, Finding 2, Record p. 16; that prior to the date last insured the plaintiff (i) suffered from an episode of non-sustained ventricular tachycardia in 1989, which resolved completely after treatment with the drug Quinaglute, (ii) had a non-fixed apical inferior defect, with no evidence of any myocardial infarction[2], (iii) had minimal osteoarthritic spurring of the lumbosacral spine, with normal alignment of the vertebral bodies and (iv) had a lipoma of the left scapula excised in 1982, with no residuals, Finding 3, Record p. 16; that at no time prior to the date last insured did the plaintiff suffer from a severe impairment or combination of impairments, Finding 4, Record p. 16; and that the plaintiff was not under a qualifying disability at any time prior to the date last insured, Finding 5, Record p. 16. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs*., 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions

[2]This finding is erroneous inasmuch as it derives from the medical records of another Barbara Billings whose records mistakenly were forwarded to the plaintiff's counsel along with those of the plaintiff. *See* Record pp. 13-14 (in which the administrative law judge cited Exhibit 5F for finding of non-fixed apical inferior defect), 399-401 (colloquy between plaintiff's counsel and administrative law judge explaining that Exhibits 5-9 and 11F were those of wrong Barbara Billings). Indeed, the bulk of the record before the court, encompassing pages 100-292 and 305-82, consists of medical records of the wrong Barbara Billings, which should have been stricken before the record was certified for presentation to the court.

drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The commissioner in this case reached Step 2 of the sequential evaluation process, at which stage the claimant bears the burden of demonstrating that she has a severe impairment or combination of impairments that significantly limit her ability to do basic work activities. 20 C.F.R. § 404.1520(c); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). The burden at Step 2 is *de minimis*, "designed to do no more than screen out groundless claims." *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986). Therefore, when a claimant produces evidence of an impairment or combination of impairments, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id.* (quoting Social Security Ruling 85-28).

The plaintiff identifies three errors. Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 5). Two are variations on the theme that the administrative law judge detoured from the requirements of Social Security Ruling 83-20, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 49-58, which governs determinations of disability onset. The third is a related complaint that the administrative law judge failed to develop the record adequately. The administrative law judge in this case plainly failed to develop the record adequately. This error, in turn, undermined the substantiality of evidence supporting the ultimate finding that the plaintiff suffered no severe impairment as of the date last insured.

SSR 83-20 instructs that

> [i]n disabilities of nontraumatic origin, the determination of onset involves consideration of the applicant's allegations, work history, if any, and the medical and other evidence concerning impairment severity. The weight to be given any of the relevant evidence depends on the individual case.

Id. at 50. The date alleged by the claimant should be used "if it is consistent with all the evidence available." *Id*. at 51. "[T]he established onset date must be fixed based on the facts and can never be inconsistent with the medical evidence of record." *Id.*

According to SSR 83-20, "it may be possible," but only "[i]n some cases," for the administrative law judge to use the medical evidence of record "to reasonably infer that the onset of a disabling impairment(s) occurred some time prior to the date of the first recorded medical examination." *Id*. Such a determination "must have a legitimate medical basis"; it is necessary to call on the services of a medical advisor in such circumstances. *Id.*

SSR 83-20 also contemplates the possibility that the available medical evidence will not yield a reasonable inference about the progression of a claimant's impairment. *Id*. In such a case, "it may be necessary to explore other sources of documentation" such as information from family members, friends and former employers of the claimant. *Id*. "The impact of lay evidence on the decision of onset will be limited to the degree it is not contrary to the medical evidence of record." *Id.* at 52.

In her application, the plaintiff claimed disability as the result of arthritis in her knees, carpal tunnel in both hands and a lower back injury.[3] Record p. 52. She last worked on July 15, 1986 as an assembler in the electronics industry. *Id*. at 52, 56. As of May 23, 1996, the date of her application, she had sought treatment for only one of the claimed disabling ailments, the back injury. *Id.* at 53,

[3]The plaintiff conceded at oral argument that she did not press any claims based on alleged carpal-tunnel syndrome.

57. The relevant medical evidence included a lumbar-spine x-ray dated June 17, 1982 showing an "[u]nremarkable lumbar spine" with "minimal osteoarthritic spurring," and a memorandum from Dr. John F. Maxfield, an osteopathic physician who treated the plaintiff for her back injury, stating: "Barbara Billings may return to limited work on February 1, 1983. She is only to work 4 hours a day with no lifting, bending, or reaching. Barbara is to gradually increase her hours as her condition permits." *Id*. at 79, 383. The plaintiff explained at her hearing that she did not see a doctor regarding her arthritis inasmuch as she had no medical insurance, there is no cure for arthritis and she is allergic to medications. *Id.* at 398.

In connection with her disability application, the plaintiff was examined on April 29, 1997 by Paul Stucki, M.D., a medical consultant for the State of Maine Disability Determination Services. *Id.* at 293. Dr. Stucki recorded the plaintiff's subjective complaints, including that both knees had become "quite achy" and that she "frequently has aching pain from the low back almost down to the right ankle (again including the knee) and frequently finds it 'hard to walk.'" *Id*. On examination Dr. Stucki noted, among other things, that approximately halfway through the deep-knee bending maneuver the plaintiff placed hands on knees and stated that they hurt, at which point the maneuver was discontinued. *Id*. at 295. Dr. Stucki also noted mild to moderate diffuse lumbosacral area tenderness without obvious or palpable spasm. *Id*. at 296. He expressed no opinion as to the plaintiff's limitations but reported her own observations that she could sit about half an hour, but with her back "burning," could lift about ten pounds and was not sure how long she could stand or walk comfortably. *Id*. at 298, 303. Dr. Stucki made no finding as to the onset date of any of the plaintiff's claimed conditions.

Although discrediting the plaintiff's self-diagnosis of carpal-tunnel syndrome, *id.* at 294, Dr.

Stucki was persuaded that she might well have some developing arthritic changes in the lower back and knees, *id*. at 297. He noted his intention to order knee x-ray studies, although inexplicably he ordered none of the plaintiff's spine.[4] *Id*. at 298. Only one knee was x-rayed, showing "[m]arked degenerative arthritic changes . . . involving all three compartments of the knee" with "some narrowing of the medial joint space." *Id*. at 304, 388. Dr. Stucki did not revisit the record to discuss the significance of the x-ray finding, and no medical expert testified at the plaintiff's hearing.

The administrative law judge found it unnecessary to reach this troubling issue, however, inasmuch as he dismissed the plaintiff's claims for lack of medical evidence that she suffered any significant impairment as of the date she was last insured. *Id*. at 15. He rebuffed an offer by the plaintiff's counsel that she undergo additional x-rays, reasoning that they would have little utility in demonstrating that her impairments had existed six years ago. *Id*.

In so doing, the administrative law judge left his task of developing the record half-done. At her hearing the plaintiff provided a reasonable explanation as to why she did not seek medical attention for her suspected arthritis. The administrative law judge did not challenge her credibility. Dr. Stucki suspected, based on the results of his examination, that she might indeed suffer from arthritis of the spine and knees. The knee x-ray corroborated this suspicion.

In these circumstances, the administrative law judge should have ensured that (i) x-ray (or other appropriate diagnostic) studies were completed of both knees and the spine, (ii) these materials were then interpreted by a medical advisor qualified to assess the severity of the arthritis condition and, if disabling, to opine (if possible) on the likely state of that condition as of the alleged date of

[4]It is unclear whether the plaintiff herself or someone else requested the knee x-ray studies, which Dr. Stucki describes as "the requested knee x-ray studies." Record p. 298.

onset (July 15, 1986) and prior to the date last insured (June 30, 1991), and (iii) if the condition were deemed disabling, lay evidence was obtained if possible as to the state of the plaintiff's functioning in the period from July 1986 to June 1991.[5] *See, e.g., Bailey v. Chater*, 68 F.3d 75, 79 (4th Cir. 1995) (because evidence regarding onset date was ambiguous, administrative law judge did not have discretion to forgo consultation with medical advisor); *Heggarty*, 947 F.2d at 997 (circumstances in which secretary has responsibility to help develop record include those in which there are gaps in evidence necessary to reasoned evaluation of claim and where it is within power of administrative law judge, without undue effort, to see gaps are filled); SSR 83-20 at 51 (noting need to explore other sources of documentation, such as information from family members, friends and former employers, when reasonable inferences about progression of impairment cannot be made on basis of evidence in file and additional relevant medical evidence not available).

Only after making these efforts could the commissioner be in a position to make a finding, supported by substantial evidence, as to whether the plaintiff was disabled prior to the date she was last insured.

For the foregoing reasons, I recommend that the decision of the Commissioner be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

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[5]The commissioner at oral argument contended that SSR 83-20 is not implicated unless a claimant demonstrates that he or she currently is disabled. The plaintiff disagreed, asserting that the commissioner must undertake the SSR 83-20 analysis if a claimant meets the *de minimis* burden of showing that, at least as of the current time, her impairments are severe. SSR 83-20 does appear to presuppose that an individual has been determined to be disabled, though recognizing that in establishing onset date it is not necessary, "[p]articularly in the case of slowly progressive impairments, . . . for an impairment to have reached listing severity (i.e., be decided on medical grounds alone) before onset can be established. In such cases, consideration of vocational factors can contribute to the determination of when the disability began." SSR 83-20 at 49, 51. In any event, the commissioner in this case did not develop the record sufficiently to determine whether, even as of the current time, the plaintiff was disabled.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of May, 1999.

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David M. Cohen
United States Magistrate Judge